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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Southwestern Bell Telephone Co.	)	CC Docket No. 97-158
	)	Transmittal No. 2633
Tariff F.C.C. No 73	)	

To: Chief, Common Carrier Bureau

COMMENTS OF U S WEST, INC. ON SWBT'S DIRECT CASE

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SUMMARY

U S WEST Communications, Inc. ("U S WEST") submits these comments in support of the tariff filing of Southwestern Bell Telephone Company ('SWBT") at issue in this proceeding. The filing is consistent with the Commission's decision in the Access Charge Reform proceeding to take a market-based approach to moving access charges toward cost. As the Commission acknowledged in that proceeding, the access services of incumbent LECs already face real competition in many quarters. Continued regulation of incumbents' offerings in the face of that competition substantially distorts the marketplace and undermines the ability of incumbents to cover their costs of providing service to their low-volume customers. In contrast, permitting incumbents to fashion appropriate responses to their competitors' lower-priced offerings will cause access charges to approach cost without impairing universal service.

Precedent supports SWBT's reliance on the competitive necessity doctrine as a justification for meeting lower prices in specific instances. As SWBT has demonstrated, the competitive necessity doctrine applies to dominant LECs in today's market with no less force than it did to AT&T when it was a dominant interexchange carrier. The same considerations that led the Commission to allow AT&T pricing flexibility to meet competition -- long before AT&T was found to face substantial competition, much less to be non-dominant -- are clearly present today with respect to access services like AT&T's interexchange services in the 1980s, incumbent LEC's access services today face competition that is emerging and, in the case of high-capacity services for high-volume costumers, is full-blown in many markets. In many of U S WEST's major markets, competitors have succeeded in capturing a substantial and growing share of the market for high-capacity special access services.

Finally, the Commission should approve tariffs for integrated packages of interstate access services in the same manner in which it approved AT&T's early Tariff 12 filings. As in the case of the competitive necessity doctrine, there is no principled reason for denying incumbent LECs the same degree of pricing flexibility that was afforded AT&T in the early days of long distance competition. The results of allowing such flexibility would be highly beneficial to customers and the market.

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U S WEST Communications, Inc. ("U S WEST") respectfully submits these comments pursuant to the Order Designating Issues ("Designation Order") for Investigation in the above-captioned proceeding.

INTRODUCTION

The Commission should accept and indeed encourage the efforts of incumbent LECs to respond to the growing -- and in some areas already flourishing -- competition in markets for interstate access. During the 1980s the Commission afforded AT&T ever greater flexibility to respond to the competitive inroads being made by MCI and Sprint in long distance service. It now should allow the incumbent LECs at least as much freedom to compete against MFS, TCG, ICG, ELI, and others. Indeed, the case for allowing incumbent LECs to compete on

price with respect to high capacity access service is even more compelling: Their competitive access provider ("CAP") rivals in many cities already have much greater market share then AT&T's competitors had when, for example, the Commission allowed AT&T's first Tariff 12 and Tariff 15 services to go into effect. There accordingly is no justification for denying incumbents the opportunity, which Southwestern Bell Telephone Company ("SWBT") seeks here, to rely on the competitive necessity doctrine to meet lower competitive prices in specific instances that satisfy the Commission's long-established criteria for the doctrine's application. In addition, although the issue is not directly presented by SWBT's current application, the Commission should anticipate, and should approve, the incumbents' filing of tariffs for integrated services packages analogous to those AT&T began offering a decade ago under Tariff 12.

DISCUSSION

The core issue in this proceeding is whether SWBT should be permitted to discount its rates for high capacity interstate access service in order to respond to rapidly increasing competitive pressures. Specifically, SWBT seeks approval of a proposed tariff that would permit it to respond competitively to RFPs from customers for its access services. SWBT argues that approval is warranted under the doctrine of competitive necessity, which "permits carriers to justify preference or discrimination in their tariff offerings because of competitive pressures."[1/]

1/ Decreased Regulation of Certain Basic Telecommunications Services, 2 FCC Rcd 645, 657 n.67 (1987).

This issue must be considered against the backdrop of the fundamental changes wrought by the 1996 Act in the regulatory regime and market structure for local telecommunications. As the Commission recognized in its recent First Report and Order in Access Charge Reform, the overriding purpose of the 1996 Act is that of "opening all telecommunications markets to competition."[2/] This goal reflects an essentially undisputed view that competition, not regulation, offers the most effective means for ensuring that consumers receive access to high-quality telecommunications services at the lowest possible prices. Thus, the Act is fundamentally a deregulatory statute. Indeed, section 10 of the Act declares that the Commission "shall forbear" from applying a regulation in any context where the regulation is not necessary to preserve the reasonableness of rates or otherwise protect consumers. 47 U.S.C. § 160(a). The Commission accordingly has committed, with respect to the interstate access charge market, "to eliminate, either now or as soon as changes in the marketplace permit, any unnecessary regulatory requirements on incumbent LEC exchange access service."[3/] Such unnecessary requirements both handicap incumbent LECs in competing with "inefficient new entrants" for high-volume users of access services (such as AT&T and Coastal here) and jeopardize the sources of revenue that enable LECs to cover the costs of providing service to low-volume users.[4/]

2/ First Report and Order, FCC 97-158 (released May 16, 1997), at ¶ 262 (quoting joint explanatory statement).

3/ Access Charge Reform NPRM, 11 FCC Rcd 21354 (1996) (emphasis added).

4/ Id. at 21361, 21438.

As set forth below, SWBT has demonstrated in this proceeding that the nature of the RFP process, coupled with the burgeoning competition in the market for the interstate access services involved here (high capacity special access), "would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor."[5/] Consistent with the procompetitive, deregulatory principles of the Act, the Commission should give SWBT pricing flexibility to fashion responses that would be available to any competitor in a competitive market. It should reaffirm the vitality of competitive necessity as a justification for lower prices. The Commission should reject the urgings of AT&T -- which took advantage of the competitive necessity doctrine while it was treated as a dominant carrier, and which in the present case solicited the lower price through its RFP -- to cripple the incumbent LECs' use of the doctrine by arbitrarily curtailing its application.

Moreover, as a general matter, sound economic principles demand that incumbent LECs be allowed to respond to competition by entering into access service arrangements tailored to the needs of specific customers. Such arrangements will provide incumbent LECs with flexibility to align prices and costs, and decrease the costs and uncertainty on both sides of the transaction.[6/] That is why term and volume commitments are widely used throughout our economy generally and in the long distance market specifically.[7/] Regulations that impede the incumbent LECs' use of discounts or similar mechanisms for sharing cost savings under

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5/ Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 438 (1983).

6/ Affidavit of Robert G. Harris, ¶ 10 (Aug. 29, 1997).

7/ Id. at ¶¶ 8-11.

customer-specific agreements impede competition and prevent customers from obtaining the lowest possible price for the services they purchase.[8/] Further, as evidenced by past experience with other regulated industries, overly restricting the activities of incumbent LECs while not constraining their competitors in the access services market will lead to inefficient prices and production and cause the incumbent LES to unnecessarily suffer devastating losses.[9/]

In short, the Commission should allow incumbent LECs, under the competitive necessity doctrine, to establish interstate access tariffs designed to respond to specific competitive challenges. That is the authority SWBT seeks in this proceeding.[10/] Furthermore, the Commission should make clear at the earliest appropriate opportunity that incumbents LECs may fashion generally available, separately tariffed packages of integrated interstate access charges, similar to AT&T's Tariff 12 offerings of the late 1980s.[11/]

I. THE COMMISSION'S MARKET-BASED APPROACH TO ACCESS CHARGE REFORM CAN ACHIEVE ITS GOALS ONLY IF INCUMBENT LECS ARE ALLOWED TO MEET THE COMPETITIVE OFFERINGS OF THEIR RIVALS.

8/ Id. ¶ 12.

9/ Id. ¶¶ 19-21.

10/ MCI and Sprint have attempted to obscure the issue by mischaracterizing SWBT's proposal as a contract or ICB tariff and contending that it is therefore unlawful. As set forth in its Direct Case, however, SWBT did not file its RFP tariff as a contract or ICB tariff; its motivation was simply to meet competition for the service in question. Nor has the Commission ever suggested that its rules concerning contract tariffs and ICBs nullify the competitive necessity doctrine.

11/ In addition, with competition increasing rapidly, the Commission may soon need to consider permitting incumbent LECs to file contract tariffs for interstate access services.

In its First Report and Order in the Access Charge Reform proceeding, the Commission has elected a market-based approach to eliminating the implicit subsidies that incumbent LECs have been required to include in their interstate access charges. Under this approach, the Commission contemplates that it will "rely on potential and actual competition from new facilities-based providers and entrants purchasing unbundled elements to drive prices for interstate access services toward economic cost." Access Charge Reform NPRM, 11 FCC Rcd, 21363. In its comments in that proceeding, U S WEST supported the Commission's proposal to rely on a market-based approach,[12] and it continues to support that approach.

More specifically, as the Commission observed in that proceeding, U S WEST and others have proposed that incumbent LECs be permitted to offer contract carriage to respond to the competition generated by an RFP. Id. at 21439. U S WEST thus does not support the suggestion in the Access Charge Reform NPRM -- and the Designation Order here -- that incumbents must continue to be handcuffed in meeting the highly selective competitive initiatives of their rivals until some showing of potential competition can be made with respect to all other markets. This is particularly true if potential competition is defined by a prescriptive set of conditions whose satisfaction will be the grist for endless litigation delay.[13]

12/ Comments of U S WEST, Inc. (June 29, 1997) ("U S WEST Comments") at 20-24.

13/ U S WEST has proposed, by contrast, that "phase I" for access charge reform be triggered in each state by the negotiation of a signed interconnection agreement. U S WEST Comments at 30.

The Commission has acknowledged that incumbents' access services already face real competition in many quarters: For example, "[t]he introduction of competition from providers operating their own network facilities or leasing network facilities as unbundled network elements may undermine [existing] access rate structures. A competing provider can . . . target selectively the incumbent LEC's high-volume end users with efficiently priced access service offerings." 11 FCC Rcd. 21361. Continued regulation of incumbents' offerings in the face of that competition substantially distorts the marketplace by "plac[ing] the incumbent LEC at a regulatorily-imposed disadvantage in competing for high-volume users." Id. at 21361. Moreover, the loss of market share associated with such disadvantage "jeopardizes the source of revenue that permits the incumbent LEC to cover its costs of providing service to its low-volume end users." Id. Thus, imposing regulatory handicaps on incumbents will threaten the sufficiency of universal service support, which the Commission has recognized should be maintained in its present form until the new federal universal service regime can be implemented. See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, FCC 96-325 (Aug. 8, 1996) ¶ 715.

In contrast, permitting incumbents to fashion appropriate responses to their competitors' lower-priced offerings is the quickest and surest means of accomplishing convergence of "the rates that local carriers impose for the transport and termination of local traffic [with those] for the transport and termination of long distance." 11 FCC Rcd. 21361. Accordingly, the Commission should not yield to the short-sighted, pro-regulatory temptation to hold hostage the incumbents' ability to respond to real competition in particular markets until

similar competition emerges in others. As noted above, unnecessary regulatory restrictions on access charge services should be eliminated "either now or as soon as changes in the marketplace permit." Id. at 21354. As shown below, SWBT has made a substantial showing under the competitive necessity doctrine that, in the markets at issue in this proceeding, those changes have already occurred.

II. THE COMPETITIVE NECESSITY DOCTRINE APPLIES TO DOMINANT LECs IN TODAY'S MARKETPLACE WITH NO LESS FORCE THAN IT DID TO AT&T WHEN IT WAS A DOMINANT IXC.

As SWBT has demonstrated, the origin and development of the competitive necessity doctrine do not provide any basis for limiting its application to dominant LECs. Nor do any differences between the interexchange and the exchange access markets suggest any principled basis for such a distinction.

Although first recognized even earlier,[14/] the doctrine of competitive necessity was definitively adopted by the Commission in Private Line Rate Structure and Volume Discount Practices, 97 F.C.C.2d 923 (1984). The Commission relied on the doctrine to articulate circumstances in which "a carrier" under Section 202(a) of the Communications Act may charge different rates to different customers.[15/] The rates at issue in that proceeding were volume discounts for both private line and special access services, but the focus of the analysis was of

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14/ See Telpak Tariff Sharing Provisions, 23 F.C.C.2d 606, 613 (1970), rev'd on other grounds sub nom. AT&T v. FCC, 449 F.2d 439 (2d Cir. 1971).

15/ Section 202(a) prohibits only "unjust or unreasonable" discrimination. 47 U.S.C. Section 202(a).

general application. Section 202(a) is applicable to all common carriers for all services, whether dominant or not, and the Commission's adoption of the doctrine relied upon a finding that "[c]ompetition is growing for all domestic services offered by all carriers." 97 F.C.C.2d at 947 (emphasis added). Moreover, to support its formulation of the doctrine, the Commission relied upon the "meeting competition" defense of Section 2(b) of the Robinson-Patman Act, as interpreted by the Supreme Court in a then-recent decision.[16/] The application of the Robinson-Patman Act is not confined to any particular kind of market; it extends to "any line of commerce." 15 U.S.C. § 13(a).

Five years later, in applying the doctrine to AT&T's Holiday Rate Plan, the Commission specifically held that, "[a]lthough this is not a private line tariff, the competitive necessity doctrine has a broader application than private line services." 4 FCC Rcd 7933, 7934 (1989). The Bureau has since referred to the doctrine in markets as far removed from private line service as video dial tone,[17/] and it has rejected MCI's argument that the doctrine "does not extend to switched voice offerings."[18/] Indeed, in the pending Access Charge Reform proceeding the Commission said that it sees no reason to differentiate between the exchange access and other telecommunications markets in applying its principles of competition, noting that its proposals with respect to access charges "are similar to forms of pricing flexibility we have in the past

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16/ Falls City Industries, supra.

17/ U S WEST Communications, Inc. Tariff F.C.C. No. 5, 10 FCC Rcd 12184, 12187 n.57 (CCB 1995).

18/ AT&T Communications, 4 FCC Rcd 7199 (CCB 1989).

accorded incumbent LECs and IXCs facing increased competition in markets for particular services." First Report and Order ¶ 264.

Nor is there any basis for the suggestion that incumbent LECs are somehow ineligible for the opportunity to price flexibility in response to competition. In OCP Guidelines the Commission granted the Bell Operating Companies the freedom to price flexibly in providing interexchange services where exchanges cross LATA boundaries. 50 Fed. Reg. 42956, 42957 (1985). The Commission's ruling in no way implied that BOCs could not have pricing flexibility for access services as well; it simply held that question to be "beyond the scope of this proceeding." Id. at 42957.

Moreover, if it is lawful for the incumbent LECs' competitors to offer single customer discounts in response to RFPs or otherwise, it must be lawful as well for incumbents to respond to those offers. As the Commission has often emphasized, the same statute governs all common carriers; the Commission simply relies on different tools -- regulation or competition -- to achieve the statute's goals.[19/] Conversely, if sections 201, 202, or 203 of the Communications Act prohibit such discounts by incumbents -- and U S WEST does not believe they do -- then they also prohibit discounts by new entrants and the Commission should investigate such pricing by CAPs and others, just as it initiated an investigation of AT&T's pricing in Holiday Rate Plan, 4 FCC Rcd. 7723 (1988).

19/ See generally, e.g., Interexchange Competition Order, 6 FCC Rcd. 5880 at ¶¶ 1-9, 123-32 (1991).

There is no economic or other policy justification for barring incumbent LECs from relying on the competitive necessity doctrine where they satisfy its criteria. The same considerations that led the Commission to allow AT&T pricing flexibility to meet competition -- long before AT&T was found to face substantial competition,[20/] much less to be non-dominant[21/] -- are clearly present today with respect to access services. The Commission applied the doctrine to AT&T's private line and MTS services in the mid-1980s because AT&T then faced emerging -- not full or substantial -- competition. In OCP Guidelines, the Commission said that it believed "the guidelines are necessary to permit dominant carriers, such as American Telephone & Telegraph Co., to offer flexible pricing packages to consumers in light of increased competition in the interstate long-distance market while protecting other rate payers and promoting competition." 50 Fed. Reg. 42945. "In particular," the Commission explained, "we recognize that the essence of an emerging competitive process is that firms which at one time may have had great discretion in setting prices are no longer free to do so without competitive consequences." Id. at 42951. The Commission concluded, "we do not believe it to be wise as a matter of policy to prevent AT&T from engaging in any competition until it is determined that the market is 'fully competitive.' To restrain AT&T from competing until such a hypothetical degree of competition develops would send erroneous signals to the marketplace." Id. at 42951.

20/ See Interexchange Competition Order.

21/ Motion of AT&T Corp. To Be Reclassified as a Nondominant Carrier, 11 FCC Rcd. 3271 (1995).

Like the IXCs' interexchange services in the 1980s, the incumbent LECs' access services today face competition that is emerging and, in the case of high capacity services for high-volume customers, is full blown in many markets. Under the 1996 Act, interstate access markets are indisputably open to competition. New entrants even have the option of offering interstate access services using unbundled network elements purchased at cost from U S WEST. As a further spur to competition, the Commission has proposed completely detariffing all non-incumbent LEC providers of interstate exchange access and has adopted permissive detariffing in the meantime.[22/]

Moreover, incumbent LECs have faced substantial, facilities-based competition for high volume business users for a number of years. As SWBT notes in its Direct Case (at 8), its losses of access revenues in major markets sometimes exceed 40% -- over twice as much as experienced by AT&T in the long distance market in 1984. U S WEST also faces widespread competition in the high volume access services market. There is currently active competition in every major business center, and some second and third tier markets, in U S WEST's territories.[23/] These competitors are able to efficiently target business customers by constructing facilities in the most concentrated geographic areas. Further, business customers are price-elastic when it

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22/ Hyperion Telecommunications, FCC 97-219, supra.

23/ See Harris Affidavit at ¶28.

comes to telecommunications services -- large users have stated that they routinely submit Requests for Proposals before providing such services.[24/]

As a result, in many of U S WEST's major markets, competitors have succeeded in capturing a substantial and growing share of the market for high capacity (i.e., DS1 and DS3) services. For example, between the fourth quarter of 1994 and the fourth quarter of 1996, the market share of competitors for high capacity special access services jumped from 29.2% to 45.1% in Denver; 20.7% to 32.6% in Seattle; 24.1% to 34.7% in Portland; 8.0% to 19.3% in Minneapolis; and 7.6% to 27.3% in Phoenix.[25/] Moreover, a report on new growth in the high capacity special access services market found that in four of the seven markets studied, U S WEST was capturing less than 50% of the new business; in no case was that figure higher than 72.5%.[26/] Thus, the evidence clearly demonstrates that the market for high capacity interstate access services is highly competitive.

III. IN APPLYING THE COMPETITIVE NECESSITY DOCTRINE, THE COMMISSION SHOULD NOT IMPOSE CRITERIA THAT UNDULY LIMIT INCUMBENT LECS' FLEXIBILITY TO RESPOND TO RFPS.

Given the high degree of competition, there is no need for a case-by-case application of the competitive necessity doctrine with respect to high capacity special access

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24/ 6 FCC Rcd. 5887.

25/ These figures are from a January 22, 1997 report prepared for U S WEST by Quality Strategies, Washington, D.C.

26/ These figures are from a January 27, 1997 report prepared for U S WEST by Quality Strategies, Washington, D.C.

services such as those for which SWBT proposed its tariff. Competition in these services is sufficiently intense that the Commission has proposed removing them from price cap regulation. 11 FCC Rcd. 21422. Section 10 the the Communications Act requires the Commission to forbear from applying regulations where they are unneccessary to protect consumers, 47 U.S.C. § 160. Accordingly, the Commission should at a minimum grant incumbent LECs pricing flexibility with regard to high capacity special access services on a streamlined basis. For all other access services, the Commission should apply the competitive necessity doctrine using the criteria articulated in the Private Line Rate Order and the OCP Guidelines, as discussed below.

The Designation Order invites comment on whether the competitive necessity doctrine should be modified in the context of responses to RFPs. The Order's preliminary analysis of the issue seems to look in two inconsistent directions. It recognizes the force of the D.C. Circuit's rationale that, in the context of an RFP, a carrier cannot lawfully obtain in advance the information about competitors' bids. Thus, the Order suggests, the carrier may have difficulty meeting the first prong of the competitive necessity test as formulated in other contexts -- i.e., whether "an equal or lower priced competitive offering is available to the customer of the discounted offering."[27/] Because it may not be "possible to satisfy the first prong of the test in an RFP situation" (¶ 25), the Order suggests that the test might need to be modified in this context. But it also suggests that the Commission might "simply . . . hold that dominant LECs are precluded from invoking the competitive necessity test under these circumstances." Id.

27/ See Designation Order ¶ 25: "We note that the RFP process itself may interfere with a LEC's ability to determine the presence and extent of competitive alternatives, since the LEC will not have advance knowledge of its competitors' responses to the RFP."

The Commission should be loathe to roll back the criteria for applying the competitive necessity doctrine. As demonstrated in the prior section, such a stingy application of the doctrine would be without precedent. Moreover, in the wake of the 1996 Act and the Commission's endorsement of market-based solutions to access charge reform, it cannot be Commission policy to handcuff LEC competition in order simply to promote "a stronger market position" for CAPs. 100 F.3d at 1008. Rather, the Commission should be seeking to promote competitive responses by incumbent LECs to bid requests that obviously are intended to seek rates lower than those provided by tariff.[28/] The Commission should recognize in the RFP context what it concluded ten years ago: "The fact that such a bidding process takes place indicates both the existence of competitive alternatives . . . and the customer's willingness and ability to use" them.[29/] This is particularly true today, since any enterprising carrier can respond to an RFP, regardless whether the carrier has any presence at all in the relevant location, by offering to provide service through the combination of unbundled network elements purchased from the incumbent LEC at cost-based prices.

The second prong of the competitive necessity doctrine is that "the terms of the discounted offering are reasonably designed to meet that competitive offering without undue

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28/ This is particularly true in light of the detariffing orders, which have permitted CAPs to change their rates on as little as one day's notice. See Policy and Rules Concerning the Interstate, Interexchange Marketplace, FCC 97-293 (rel. Aug. 20, 1997), at ¶ 55 n.170. This policy makes it extremely difficult to monitor competitors' prices for purposes of obtaining the information necessary to satisfy the competitive necessity test as applied in other contexts.

29/ Decreased Regulation of Certain Basic Telecommunications Services, 2 FCC Rcd 645, 650 (1987).

discrimination." 100 F.3d 1004, 1006. The purpose of this test is to ensure that the lower priced discount is not offered more widely than is necessary to meet the competitor's offer. In the case of access service, it is reasonable to limit the availability of the discount to a single customer in a single geographic market because such a response is appropriately limited to the competition it is meeting. This is consistent with the decision in Falls City Industries, in which the Supreme Court noted that "a seller must limit its lower price to that group of customers reasonably believed to have the lower price available to it from competitors."[30/]

The third prong of the doctrine is that the discounted offering "contributes to reasonable rates and efficient services for all users." 100 F.3d 1004, 1006. This means simply that a customer-specific discount must not increase the cost burden that is borne by customers that do not receive the discount. So long as the discounted price makes a contribution to common costs, other customers are benefitted rather than burdened. The Designation Order tentatively concluded that SWBT's proposed prices satisfy this standard because they would cover direct costs and make a contribution to overhead costs. Designation Order ¶ 34. The Commission should confirm this conclusion and should treat future proposals by incumbent LECs similarly.

IV. THE COMMISSION SHOULD BE PREPARED TO ALLOW INCUMBENT LECS TO FILE TARIFFS FOR INTEGRATED PACKAGES OF INTERSTATE ACCESS SERVICES.

30/ Falls City Industries, supra, at 450.

The Commission should anticipate that incumbent LECs, in their efforts to meet the competitive demands of the new marketplace, will seek to file tariffs for integrated packages of interstate access services -- analogous to AT&T's Tariff 12 packages approved by the Commission a decade ago. The Commission should approve such tariffs in the same manner as it approved AT&T's early Tariff 12 filings.

Starting in 1988, as it faced increasing competitive pressure from MCI, Sprint, and other IXC's, AT&T began responding to competitors' initiatives not just through focused responses under the competitive necessity doctrine (as SWBT has done here), but also by designing customized, integrated services to meet the particular needs of individual customers. AT&T provided these service packages, which included discounts for volume commitments over multiyear periods, under Tariff 12 offerings that made the services available to similarly situated customers.

The Commission allowed AT&T's early Tariff 12 options to go into effect in 1988. In 1989, the Commission upheld AT&T's Tariff 12 approach, while requiring AT&T to eliminate some restrictions in its options.[31/] The Commission's decision to approve Tariff 12 was not based on a finding that AT&T faced substantial competition for the services involved. Rather, it simply found that integrated Tariff 12 offerings were not "like" disaggregated offerings of the various component services. Tariff 12 Order at 4934. Where two services are not "like," price differences between them will not violate the "unreasonable discrimination" prohibition of

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31/ AT&T Communications, Revision to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd. 4932 (1989)("Tariff 12 Order").

section 202(a). See Designation Order ¶ 15. The Commission concluded that, so long as AT&T made its Tariff 12 offerings available to any "similarly situated customers" seeking "like" packages of services, those offerings would not be unreasonably discriminatory. Tariff 12 Order at 4934.

Consistent with its prior treatment of AT&T, the Commission should approve incumbent LEC tariffs for integrated packages of interstate access services, limited only by the requirement that the LECs make the offering available to similarly situated customers. As in the case of the competitive necessity doctrine, there is no principled reason for denying incumbent LECs the same degree of pricing flexibility that was afforded to AT&T in the early days of long distance competition. The degree of competition in the market cannot serve as the basis for a distinction: The Commission allowed AT&T's first Tariff 12 tariff option for a business customer to go into effect in February 1988, long before its 1991 finding that AT&T's services were subject to "substantial competition."[32/] In any event, as noted above, all of the access services of incumbent LECs now are subject to potential competition, and their high capacity services clearly are subject to substantial competition. Thus, the case for granting incumbent LECs flexibility to offer specially tariffed, integrated packages of interstate access services is if anything more compelling than the case was for AT&T's similar request in 1988.

The results of allowing such flexibility would be highly beneficial. In subsequently holding that AT&T should be permitted to offer services pursuant to individually

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32/ Interexchange Competition Order, supra.

negotiated customer contracts that are generally available to other similarly situated customers, the Commission explicitly concluded that "permitting AT&T to offer contract rates for services subject to further streamlining is in the public interest" and that "allowing AT&T greater freedom to enter into contracts with customers for these business services will benefit customers."[33/] The Commission recognized that limiting AT&T to "plain vanilla" generic tariffs, on the other hand, would unnecessarily restrict the availability of these more specialized arrangements.[34/] Subsequent history has confirmed the Commission's policy decision -- the proliferation of customized AT&T tariffs has had beneficial effects on customers and the marketplace.[35/] Thus, the Commission's experience with AT&T demonstrates the potential benefits of removing unnecessary pricing restrictions in the access services market.

CONCLUSION

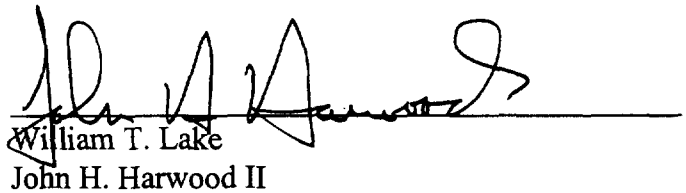
The Commission should welcome the incumbent LECs' responses to competitive offers of the rivals. Such price competition furthers the the Commission's goal in the Access Charge Reform proceeding of relying on a market-based approach to move access charges toward cost. Moreover, allowing flexible pricing is consistent with the treatment of AT&T in like circumstances, and confers important benefits on customers and providers alike.

33/ Harris Affidavit at ¶40 (citing Interexchange Competition Order ¶102).

34/ Id. at ¶41.

35/ Id. at ¶48-50

Respectfully submitted,



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AFFIDAVIT OF ROBERT G. HARRIS

I. Introduction

1. I am a Principal at the Law and Economics Consulting Group and Professor Emeritus in the Haas School of Business, University of California, Berkeley, with a Ph.D. in Economics from U.C. Berkeley. The views expressed in this affidavit are based on my extensive background in microeconomic theory, industrial organization, and the principles of antitrust and regulatory policy analysis. I have drawn on my experience in the implementation of motor carrier and railroad regulatory reforms as a consultant to the U.S. Department of Transportation from 1976-79 and as Deputy Director of Cost, Economic, and Financial Analysis at the Interstate Commerce Commission from 1980-81, and my involvement in various federal and state regulatory proceedings. Hence, my recommendations are based on my

experience as a regulator and as a consultant in the design and implementation of regulations for the transportation and telecommunications sectors. Further details of my academic and professional qualifications are provided in my attached curriculum vitae (Attachment 1).

2. The purpose of this affidavit is to demonstrate that: (1) there are substantial benefits from allowing contracts for these services; (2) competition in the access marketplace for businesses is extensive and is cause for relaxing the contracting regulation of ILECs; (3) competitive concerns do not warrant any further prohibition on ILEC contracting; (4) the Commission already has considered the same type of circumstances facing the ILECs and decided to allow the use of contracts for a dominant provider, AT&T; and (5) the marketplace experience emanating from the AT&T decisions has led to beneficial results. Taken together, these facts more than justify allowing ILECs to enter into contracts with customers; indeed, they make it a competitive necessity to do so.